PRIVY COUNCIL REPORTS

PANG CHOON KONG v. CHEW TENG CHEONG & ANOR

[P.C. (Lord Keith of Kinkel, Lord Wilberforce, Lord Roskill, Lord Brandon of Oakbrook & Lord Templeman) December 5, 1983 & January 25, 1984]

[Privy Council Appeal No. 12 of 1982]

Contract – Agency – Estate agents – Whether agent entitled to remuneration – Construction of agreement.

In this case the Government of Pahang had entered into an agreement in October 1966 with thirty persons to permit them to work an area of State Forest Land, extending to 24,000 acres in Pahang. Successive licences for areas of 1,000 acres were to be issued in consideration of the agreement of the licensees to the making of royalty payments and compliance with the conditions. By early 1973, the thirty licensees had extracted timber from 6,000 acres, so that 18,000 acres remained to be worked. At this stage one Au Ah Wah claimed to have some sort of arrangement with the thirty licensees and he sought to interest outside parties in the exploitation of the concession. He was put in touch with the three plaintiffs, two of whom were respondents in the appeal, and they in turn brought him into contact with the appellant. Au Ah Wah entered into an agreement on March 20, 1973 with the appellant whereby it was agreed that Au Ah Wah would obtain the transfer of all the thirty forest licensees to the name of the appellant or his nominees. It was also agreed that Au Ah Wah who was an advocate and solicitor should form a Limited Company for the appellant. Subsequently the appellant entered into an agreement with the three plaintiffs whereby the plaintiffs agreed to relinquish their rights to the forest land and the appellant agreed upon the performance of his contract with Au Ah Wah to pay them the sum of $900,000. In the event Au Ah Wah was unable to complete his part of the agreement as the thirty licensees were unwilling to co-operate with him. Further negotiations followed between Au Ah Wah and the appellant and on September 7, 1973, a further agreement was entered into between Au Ah Wah and the appellant and Chang. This second agreement differed from the agreement of March 20, 1973 in that only fifteen forest licensees were included as compared with thirty and the total sum to be paid to each of the forest licensees was $65,000 as against $40,000 in the March 20, agreement. Further on the same day the appellant and Au Ah Wah signed a document agreeing that the agreement of March 20, 1973 was rescinded. Subsequently the State Government entered into an agreement with the thirty licensees whereby the parties terminated the agreement of October, 1966 to enable the State Government to enter into separate agreements with three companies for the working of the remaining 18,000 acres. The State Government subsequently entered into separate agreements with each of the three companies for the working in each case of a particular area of the forest. In the case of two of the agreements, Au Ah Wah was one of the witnesses. The evidence showed that subsequently the appellant and his partner acquired the shares in two of the companies from the original shareholders who were some of the licensees. There was no evidence that the appellant or his partner obtained any interest in the third company. In December 1974 the plaintiffs brought an action against the appellant for the payment of $900,000 under the agreement of March 31, 1973. Syed Othman J. in the High Court dismissed the claim. Two of the three plaintiffs (the present respondents) appealed to the Federal Court which reversed the decision of the trial judge and gave judgment for the respondents ([1981] 1 M.L.J. 298). The ground of decision was that in substance Au Ah Wah had performed the agreement of March 20, 1973 with the appellant. The appellant appealed.

Held; by the agreement of March 31, 1973 the appellant agreed to pay the plaintiffs $900,000 upon the performance of the particular contract between Au Ah Wah and himself and no other contract. That contract was never substantially implemented. It was rescinded and replaced by another containing materially different terms and conditions. In the circumstances the plaintiffs (including the respondents) were not entitled to any payment from the appellant.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D.J. Turner Samuels Q.C. (*Lim Kean Chye* and *Lim Chuen Ren* with him) for the appellant.

P.J. Millett Q.C. (*N. Stenalt* and *Upali Mascorale* with him) for the respondents.

Shah V. Balendran, watching brief for interested party, Chang Lum Yuan.

Cur. Adv. Vult.

Lord Keith of Kinkel (delivering the Judgment of the Board): This appeal is concerned with a complicated series of transactions relating to licences for the extraction of timber from an area of forest land in the State of Pahang.

The story begins in October 1966 when the Government of the State entered into an agreement with thirty Malays to permit them to work an area of State Land Forest, extending to 24,000 acres, in the District of Temerloh (Bera). Successive licences for areas of 1000 acres were to be issued, in consideration of the agreement of the licensees to the making of royalty payments and compliance with various other conditions. It appears that the thirty licensees, operating under the agreement, had by early 1973 extracted timber from 6,000 acres, so that 18,000 acres remained to be worked. At this stage one Au Ah Wah ("Au"), an advocate and solicitor of Kuantan, appeared on the scene as a person having some sort of arrangement with the thirty licensees and seeking to interest outside parties with substantial financial resources in the exploitation of the concession. He was put in touch with the three plain-

tiffs in the action, two of whom are the respondents to the appeal, and they in turn brought him into contact with the defendant Pang Choon Kong ("Pang"), the appellant.

Au and Pang, as First and Second Parties respectively, entered into an agreement dated March 20 1973. This proceeded on the narrative that Au had logging rights over the 18,000 acres of forest land and that Pang was desirous of acquiring these rights. In actual fact Au had no such rights and was simply acting as a go-between or entrepreneur. The terms of the agreement, (omitting the last which is not material), were as follows:-

"1. The First Party agrees to transfer all his rights over to the Second Party under the following terms.

2. The Second Party agrees to pay M/s. Ong Ban Chai & Co. as stakeholders for the First Party a sum of $1,200,000/-. The sum of $120,000/- shall be paid on the signing of this agreement (the First Party hereby acknowledges the receipt of the said sum of $120,000/-).

3. The First Party agrees to form a limited company under the Companies Act, 1965 for the Second Party. The Second Party agrees to inform the First Party the name of the company as early as possible. The authorized capital of the company shall be fixed at $3,000,000/-. The expenses and fees involved in the formation and registration of this company shall be borne by the Second Party.

4. After the Company shall have been duly registered with the Registrar of Companies, Malaysia, the First Party shall endeavour to obtain the approval of the Government of Pahang and the consent of the thirty forest licensees to enter into an agreement in the name of the Company and the Government of Pahang so that the Company itself shall have the sole right over the said Area. The name of the thirty forest licensees is stated in the list attached herewith and marked "A".

5. All the thirty forest licensees shall have one share each in the Company and the First Party shall obtain the transfer of all the shares to the name of the Second Party or his nominees. The consideration for the transfer shall be paid by the Second Party to the First Party on the signing of the transfers by the thirty forest licensees.

6. The consideration stated in Clause 5 above shall be the sum of $1,200,000/- as stated in Clause 2 above and the Second Party agrees and undertakes to provide this sum to the First Party for the purpose of paying off the thirty forest licensees for the transfers of their respective shares to the name of the Second Party less $120,000/- which has been paid to the First Party.

7. The Second Party and the Company agree and undertake severally to pay the First Party the sum of $80,000/- for every forest licence of 1,000 acres which may be issued by the Forest Department from time to time to the Company for the purpose of felling and logging timber in the Area.

8. The Second Party shall, as soon as the share of the thirty forest licensees have been transferred to the name of the Second Party, in the name of the Company enter into an agreement with the First Party undertaking to pay to the First Party the sum of $80,000/- for every forest licence of 1,000 acres that may be issued from time to time by the Forest Department.

9. In the event of the Second Party or the Company failing to pay the sum of $80,000/- for every forest licence of 1,000 acres of forest land the First Party shall have the liberty and in the name of the Company to enter the forest land and to fell and log any area covered by any forest licence without any hindrance and the Second Party or the Company shall have no right to interfere with any logging operations conducted by the First Party therein and the Second Party and the Company are obliged to withdraw all their men and machinery from the Area.

10. The First Party agrees and undertakes to obtain the approval of the Government of Pahang and the consent of the thirty forest licensees to enter into an agreement as stated in Clause 4 above within a period of three months.

11. In the event of the First Party being unable to obtain the approval of the Government or Pahang and the consent of the thirty forest licensees to enter into the agreement stated above within the time specified above, the First Party shall return forthwith the sum of $120,000/- less $5,000/- as expenses incurred for the formation of the said limited Company."

At this point it should be noted that in relation to the transaction Pang was acting in association with one Chang and one Lim, and that on March 29, 1973 the three of them entered into an agreement regulating their respective interests in respect of it.

On March 31, 1973 Pang entered into an agreement with the three plaintiffs which forms the basis of their claim in the action. This narrated that Pang had entered into the March 20 agreement with Au and that the plaintiffs were responsible for securing the subject matter of that agreement, and contained the following operative provisions:-

"1. In consideration of the Second, Third and Fourth Parties [the Plaintiffs] relinquishing the rights to the 18,000 acres of forest land the subject matter of the said contract between the First Party [Pang] and Au Ah Wah dated March 20, 1973 the First Party hereby covenants with the Second, Third and Fourth Parties as follows:

(a) to pay the sum of Dollars Fifty ($50.00) per acre on the said forest land of 18,000 acres that is:
Dollars Nine hundred thousand ($900,000.00) to the Second, Third and Fourth Parties in equal shares upon the performance of the said contract between Au Ah Wah and Pang Choon Kong that is to say upon payment of the entire consideration of $1.2 million to Au Ah Wah subject to the following terms;

(b) to pay the Second, Third and Fourth Parties the sum of Dollars Five hundred and Forty thousand ($540,000/-) as aforesaid within two (2) weeks on the performance of the contract with Au Ah Wah; provided that the licence to fell timber for the first thousand acres be issued by the relevant Authorities;

(c) to pay the Second, Third and Fourth Parties the sum of Dollars Three hundred and Sixty thousand ($360,000/–) within six (6) months after the first payment of the Dollars Five hundred and Forty thousand ($540,000.00) as aforesaid and provided always that the licence to fell timber on the first thousand acres shall be granted pursuant to the said contract between the First Party and Au Ah Wah and the First Party shall issue a post-dated cheque within six (6) months upon the first payment of the $540,000.00 to the Second, Third and Fourth Parties, in equal shares.

2. The Second, Third and Fourth Parties covenant with the First Party as follows:–

(a) to receive the sum of Dollars Nine hundred thousand ($900,000.00) upon the performance of the contract entered between the First Party and Au Ah Wah in terms as stipulated."

The plaintiffs had, of course, no rights in the 18,000 acres of forest land, but nothing now turns on that. In substance, the payment of $900,000 was remuneration for introducing Pang to Au. It is that sum which the plaintiffs are suing to recover.

The next occurrence was that on August 16, 1973 solicitors acting for Pang wrote to Au drawing his attention to the fact that the period of three months specified in Clause 10 of March 20 agreement for completion of Au's part of the bargain had expired, and stating that unless he completed within one week Pang would treat the agreement as lapsed and require repayment of monies paid by him to Au under it.

The evidence indicates that the reason why Au had not completed was that fifteen of the thirty original licensees had proved unwilling to co-operate with him. One Tan Seng Eng ("Tan") had appeared on the scene and, in furtherance of certain interests of his own, had secured the defection of the recalcitrant fifteen.

Further negotiations followed, however, between Pang and Au, and on September 7, 1973 Pang, now joined by Chang, entered into a further agreement with Au in which Pang and Chang were First Party and Au Second Party. This recited the fact of the March 20 agreement and provided as follows:–

"1. The Second Party acknowledges that he has received the sum of $120,000/– from Mr. Pang Choon Kong pursuant to the agreement mentioned above.

2. The First Party agrees to advance a further sum of $150,000/– to the Second Party on the signing of this agreement (the receipt of which the Second Party hereby acknowledges).

3. The Second Party agrees and undertakes to pay this sum of $150,000/– to fifteen forest licensees of the forest area mentioned above. Each forest licensee shall be paid the sum of $10,000/–.

4. The First Party agrees to pay a further sum of $825,000/– to the Second Party for the purpose of payment to the fifteen forest licensees at the rate of $55,000/- per licensee after the First Forest Licence has been issued and the shares of the company are transferred to the First Party.

5. In the event of the Second Party failing or refusing to allow the First Party to work the said forest area, the Second Party agrees to pay a liquidated damages of five times the amount of money taken from the First Party.

5a. In the event that the Government shall cancel the agreement to grant the Forest Licence, the Second Party shall refund $185,000/– to the First Party, and this agreement shall lapse.

6. The First Party agrees to pay the Second Party the sum of $80,000/– for every licence of 1,000 acres each. The $120,000/– mentioned in the clause 1 above shall be treated as advance payment to the Second Party. The First Party shall be at liberty to deduct the sum of $20,000/– for every forest licence until the whole amount of $120,000/– shall have been deducted.

7. In the event of the Second Party failing to pay the sum of $150,000/– as stated in clause 3 and the sum of $825,000/– as stated in clause 4 above to the forest licensees, the Second Party agrees to refund both these sums to the First Party forthwith.

8. It is expressly agreed that after the payment of the two sums mentioned above, the Second Party absolutely assigns all his interests in the forest area mentioned above to the First Party except that the First Party must pay the Second Party the sum of $80,000/– for every licence of 1,000 acres."

It is apparent that the provisions of this agreement differ in certain very material respects from those of that of March 20. Only fifteen forest licensees were included as compared with thirty, though it is to be noted that a further three out of the defecting later joined in, making a total of eighteen. Further, the total sum to be paid to each of the forest licensees was $65,000, as against $40,000 in March 20 agreement.

Also on September 7, 1973, Pang and Au signed a document agreeing that the agreement of March 20 was rescinded.

Tan and Au entered into an agreement on September 1973, and Tan of the one part and Pang and Chang of the other part entered into a related agreement dated September 12, 1973. The exact purpose of these agreements is not entirely clear, but each of them was to operate only in the event of the State Government not agreeing to a split-up of the concession area which, as will be seen, did not happen. These agreements therefore need not be further analysed.

The next step was that the State Government entered into a further agreement, dated November 10, 1973, with the thirty original forest licensees. This narrated the agreement of October 1, 1966, that 6,000 out of the original 24,000 acres of the concession land had been worked out, and that the parties desired to terminate the October 1, 1966 agreement. It went on to provide that the State Government, for the working of the remaining 18,000 acres, would enter into separate agreements with three companies called respectively Syarikat Hayati Sdn. Bhd. ("Hayati"), Syarikat Bertapak Sdn. Bhd., ("Bertapak") and Syarikat Sastiva Bharu Sdn. Bhd., ("Sastiva"). An appendix set out who the shareholders of the three companies were to be. Ten names were listed for Hayati, eight for Bertapak and twelve for Sastiva, the persons named making up the thirty original forest licensees.

Sastiva was incorporated on November 16, 1973 and Hayati on February 2, 1974. Bertapak seems to have been a shell company, incorporated on June 17, 1971 which was taken over.

On May 27, 1974 the State Government entered into separate agreements with each of the three companies for the working, in each case, of a particular area of forest. Bertapak was allocated 4,800 acres, Hayati 6,000 acres and Sastiva 7,200 acres. It is perhaps of some significance that in the case of the Bertapak and Hayati agreements, but not in that of the Sastiva agreement, Au was one of the witnesses to its execution by the Company, and that Tan was one of the witnesses in the case of the Sastiva agreement.

A search of the Registry of Companies on May 23, 1977 disclosed that ten out of the twelve shareholders in Sastiva (holding 3,000 shares each) were persons listed in the Appendix to the State Government agreement of November 10, 1973 as intended to be shareholders of that company. The remaining two shareholders (also holding 3,000 shares each) appear to have been the personal representatives of two original licensees who had died. Similar searches of Bertapak and Hayati on June 16, 1977 disclosed several members of the Pang family among the shareholders in both. Almost all the shareholders in both companies had Chinese names. Madam Sin Hoon Khim, a business associate of Chang, was the largest single shareholder in each of them.

In their Lordships' opinion the proper inference is that the September 7, 1973 agreement between Au on the one hand and Pang and Chang on the other hand was implemented through the medium of the companies Bertapak and Hayati, the original shareholders of these companies being the eighteen forest licensees who remained faithful to Au. There is no reason to doubt that all the shares in these two companies were at some stage at the disposition of Pang and Chang, and that the state of the shareholdings in June 1977 flowed from transactions carried out by them or at their direction. On the other hand there is no evidence, in their Lordships' view, capable of supporting any inference that Pang and Chang, or either of them, ever held, directly or indirectly, any interest in Sastiva. This was denied by Pang and Chang and also by Tan. Tan's interest in Sastiva appears to have been that of financier and as contractor for the working of the timber in the company's area. Although Tan was a friend of Pang's since boyhood, there is no evidence of any transaction or understanding between them in relation to Sastiva, apart from the agreement of September 12, 1973, which is readily explicable on the basis that, if the State Government did not agree to a split-up of the 18,000 acres, a measure of co-operation between Pang and Tan was necessary to the promotion of their separate and distinct interests in the two areas.

The three companies proceeded to go ahead with the extraction of timber, successive licences for 1,000 acres at a time being duly issued by the forest department.

In December 1974 the plaintiffs commenced proceedings against Pang for payment of $900,000. under the agreement of March 31, 1973. The action came to trial before Syed Othman J. who on December 31, 1979 gave judgment dismissing the claim. Two of the three plaintiffs appealed to the Federal Court, and on February 8, 1981 the Court (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. and Mohd. Yusoff b. Mohamed J.) reversed the decision of the trial judge and entered judgment for the two plaintiffs. The ground of decision was that in substance Au had performed the March 20, 1973 agreement with Pang. The judgment of the Court quite correctly concluded that Pang and his associate Chang had through Hayati and Bertapak taken rights in the acreage allocated to these companies. It further concluded that they had also done so as regards the 7,200 acres allocated to Sastiva. As already indicated, their Lordships are unable to accept that this is borne out by the evidence. The Federal Court regarded it as a curious feature that the directors of Sastiva resided at Pahang, but the registered office of the company

was in Kuala Lumpur and it had a Chinese secretary. Whether or not this was a curious feature, (and no doubt the court had its reasons for so regarding it), there is nothing whatever in the evidence to establish a connection with Pang. The Court took the view that, in relation to the acreage allocated to Sastiva, the documentary evidence in the two agreements of September 7, 1973 and that of September 12, 1973 was to the effect that "... whatever benefits were obtained in the matter by Au Ah Wah and Tan Seng Eng, they were all passed over to the respondent and another, through the instrumentality of Au Ah Wah". Their Lordships are unable to find in the agreements in question any justification for this finding. It may be noticed in passing that the Federal Court appeared to have mistakenly thought that Au was a witness to the execution by Sastiva of its agreement with the State Government.

Counsel for the respondent plaintiffs was able to give only faint support to this finding of the Federal Court, and accordingly submitted an argument that the securing by Pang of the interests which he took in the acreage allocated to Hayati and Bertapak was sufficient to render him liable for payment of the commission of $900,000 or at least a *pro rata* proportion of it. It was maintained that on a proper construction of Clause 1(a) of the March 31 agreement Pang undertook to pay $50 per acre to the plaintiffs in respect of whatever acreage he might eventually take an interest in through the instrumentality of Au. He so took an interest in the 10,800 acres allocated to Hayati and Bertapak and must therefore pay $540,000.

In their Lordships' opinion this argument is unsound. The language of Clause 1(a) is, unfortunately for the plaintiffs, too clear and precise to admit of the meaning sought to be placed upon it. Pang thereby undertook to pay the plaintiffs $900,000, no more and no less, upon the performance of the particular contract between Au and himself dated March 20, 1973, and no other contract. No doubt if he and Au had rescinded that contract and entered into another upon substantially the same terms, that would not have relieved him of his liability to the plaintiffs. But that is not what happened. For genuine and practical reasons, namely Au's failure to secure the adherence of all thirty forest licensees upon the agreed terms, the March 20 agreement was rescinded and another contract entered into upon different terms. The rights of only eighteen instead of thirty licensees were to be made available so that the area available for exploitation was only 10,800 acres instead of 18,000. Further, the price payable to each of the participating licensees was increased from $40,000 to $65.000.

So far as the reference in clause 1(a) to $50 per acre is concerned, it is not possible to regard this as having any other significance than that of a description of the manner of calculating the commission payment of $900,000. It is insufficient to warrant the implication of a term to the effect that commission at that rate was to be payable in respect of whatever acreage Pang might, in the event of the particular contract of March 20 not being implemented, succeed in obtaining through some other contract with Au on different terms and conditions. In the result, the March 31 agreement is not capable of being construed as a general employment of the plaintiffs as agents for the purpose of any transaction into which Pang might enter with Au upon any terms and conditions whatsoever which might be agreed by them both. It is too tightly drawn for that. It provides particularly for commission to be payable upon, and only upon, the substantial implementation of one specific contract, namely that of March 20. That contract was never substantially implemented. It was rescinded and replaced by another containing materially different terms and conditions. In the circumstances, the plaintiffs are not entitled to any payment from Pang.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed and the order of Syed Othman F.J. restored. The respondents must pay the appellant's costs here and before the Federal Court.

Appeal allowed.

Solicitors: *Coward Chance; Kingsford Dorman.*